No. 87-677

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

TITUS J. CASAZZA,
Petitioner,

v.

JOAN O. HOLBROOK,
Respondent.

GALA H. NORDQUIST,
Petitioner,

v.

JOAN O. HOLBROOK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION (WITH SEPARATE APPENDIX)

JOHN E. DONEGAN
7 South Main Street
P.O. Box 811
Branford, CT 06405
(203) 481-6261
Counsel for Respondent

1987

Printed by
Druscia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
— 528-4254

QUESTIONS PRESENTED

Whether the scope of independent review under *Bose* is unsettled;

If so, whether the *Bose* standard of independent review should be extended to issues of falsity as well as malice.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 87-677

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

TITUS J. CASAZZA,
Petitioner,

v.

JOAN O. HOLBROOK,
Respondent.

GALA H. NORDQUIST,
Petitioner,

v.

JOAN O. HOLBROOK,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinions of the trial court in refusing to set aside the judgment *non obstante verdicto* or to set aside the verdicts are reprinted in the appendix separately bound at (A. pp. 104-117A).

The opinion of the Supreme Court of the State of Connecticut, reported at 204 Conn. 336 (1987) (no Atlantic Reporter citation yet furnished), is reprinted in the appendix to the petitioners' brief at (A. p. 27a).

REQUEST FOR DENIAL OF PETITION

The respondent, Joan O. Holbrook, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion by the Supreme Court of the State of Connecticut in this case. That opinion is reported at 204 Conn. 336 (1987) and is incorporated in the appendix to the petitioner's brief at (A. p. 27a).

COUNTERSTATEMENT OF FACTS

The respondent, Joan Holbrook (HOLBROOK), was a certified municipal assessor and the chairman of the Board of Assessors for the Town of Westbrook when the town began its decennial revaluation in 1981 (T.p. 38). Holbrook, as the most experienced member of the Board, performed the bulk of the revaluation work (T.pp. 49-51; A. 18A, 47-50A)* assisted by a real estate appraisal firm and to coassessors who are the petitioners in this action: Gala Nordquist (NORDQUIST) and Titus Casazza (CASAZZA). Nordquist had little assessing experience and confined herself to clerical work in the assessor's office (A. 18A; T.p. 1434). Casazza was a newly appointed and untrained assessor (T.p. 1070; A. 41-45A) whose part-time role (A. 52-53A) was limited to transposing information for the assessor's records to field cards used by the appraisal firm (T.pp. 370, 1434; A. 46-49A).

In January of 1982, prior to any controversy, Casazza sought and obtained a wetland reduction of the value of his own property (T.pp. 818, 819; A. 57A). Upon learning of this, Holbrook questioned him on the use of his position as an assessor to obtain the reduction (A. 59-60A). Casazza angrily denied any wrongdoing (T.p. 63) but did not return to the assessor's office until February 23, 1982 (T.pp. 562, 569; A. 62A, 66a), when he embarked on a private investigation of the assessors' records with a view to determining any misconduct on the part of Holbrook in her work as an assessor (T.pp. 64, 819;

---

* Note: There are three transcripts containing evidence taken at trial. "T" denotes the principal transcript containing 1,639 pages covering May 10, 1985, May 14, 1985, May 15, 1985, May 22, 1985, May 23, 1985, June 4, 1985, June 6, 1985, June 12, 1985, June 13, 1985 and June 14, 1985 prepared by Doris Whitmore, court monitor; "T(2)" denotes the transcript containing 156 pages for May 29, 1985 by Cheryl A. Dickson, court reporter; "T(3)" denotes the transcript containing 114 pages for May 30, 1985 by Cheryl A. Dickson, court reporter. Separate designation is necessary because of the lack of chronological pagination among the three transcripts. Transcript references in this brief are furnished merely to document the factual issues called into question by the petitioners.

A. 29-31A, 96A). Until then, he had no criticism of the plaintiff's work as an assessor (A. 26A, 60-61A).

On February 23, 1982 the results of the revaluation work culminated in an abstract which contained the October 1, 1981 values for the slightly more than 5,000 parcels of real estate located within the town. It was signed by Holbrook and Nordquist, a majority of the Board of Assessors, whose signatures validated it as the grand list for the town as of October 1, 1981 (T.p. 58; A. 26A, 53-54A). Nordquist was satisfied at the time that all of the entries were proper (A. 25A). Casazza was available at the time of signing but refused to participate (T.pp. 58, 189; A. 26A, 61A). The abstract was then delivered to the Board of Tax Review, a separate municipal tax agency, which subsequently made corrections in value for 27 of the properties on the list (T.pp. 512-513; A. 1-6A). Shortly after the signing of the grand list, Casazza privately persuaded Nordquist that she had endorsed a list which contained numerous irregularities attributable to the work of Holbrook (T.pp. 71; A. 31-33A, 71-73A). The immediate result was a confrontation and enmity between Holbrook and Nordquist (T.pp. 572, 581, 604). Thereafter, Nordquist acted in concert with Casazza in accusing Holbrook of a number and variety of wrongful acts.

On March 4, 1982 Casazza and Nordquist brought the first of their complaints to Donald Morrison, First Selectman for the Town of Westbrook (T.(2)p. 143). They alleged that Holbrook was involved in a large number of improprieties evidenced by field card erasures (although they omitted the field card for Casazza's own property on which he had obtained a reduction and an amendment that was reflected by erasure (T.p. 1072; T.(2)p. 123) and by unauthorized reductions in property values for relatives and friends (T.pp. 596, 647). The First Selectman arranged a meeting of the principals and with the appraisal firm (which had assisted in the revaluation) on March 10, 1982 (T.p. 648). At that meeting, Casazza charged Holbrook with the following specific improprieties in her duties as an assessor: (1) creating improper reductions for

wetlands in violation of *Conn. Gen. Stat.* § 22a-45; (2) 445 illegal erasures on field cards used to establish property values during the 1981 revaluation; (3) undervaluing farmland; (4) undervaluing marinas; (5) undervaluing a junkyard; (6) improperly classifying properties as landlocked; (7) 27 illegal changes in the grand list which they attributed to Holbrook after its execution; (8) improperly reducing the value of commercial property; and (9) the favoring of family and friends (T.pp. 647-654, 830-833; T.(2)pp. 143-148). Nordquist joined Casazza in these accusations (T.pp. 584, 596-597, 648-652, 1151-1155).

These accusations of misconduct were repeated by Casazza in further meetings with the First Selectman on March 16, 1982 and March 22, 1982 (T.(3)pp. 3-7). Holbrook was quick to admit responsibility as an assessor for the correction of values prior to signing of the list, but denied any impropriety in doing so and labeled the charges false (Ex. 3d; T.p. 81). The First Selectman, with the concurrence of the parties, requested an investigation of the complaint by the Connecticut Association of Assessing Officers. The story appeared in the newspapers on April 5, 1982 and thereafter became the subject of intense publicity in the months and years which followed (Ex. 3, 11, 18; T.pp. 386, 395). During the ensuing period, Casazza and Nordquist acted as regular sources of information to the press in its reportage of these events which reached the proportions of a major scandal in the small shoreline town of Westbrook (T.pp. 381, 385, 386, 399, 421-423, 591, 592, 1150, 1152; T.(3)pp. 56-63, 94). The information which the petitioners supplied and the frequent republication and repetition of their several charges provided continuing fuel for a controversy which not only had aspects of sensationalism but involved a matter of interest to many of the town's residents — the validity of the tax assessment on one's own property. Casazza's use of the press as a forum for his charges is seen on April 8, 1982, when the Middletown Press quoted the opinion of the Connecticut Association of Assessing Officers president, William J. Coughlin, Jr., that the charges reported did not appear to involve illegal conduct. Casazza

immediately responded by calling the newspaper to dispute Coughlin's opinion and to assert that Holbrook's conduct clearly violated the provisions of *Conn. Gen. Stat.* § 12-62 (Ex. 3F; T.pp. 447, 448; T.(3)p. 97) and in his frequent contact with news reporters (T.(3)pp. 97-99). Casazza called a special meeting of the Board of Assessors on March 25, 1982 at which he and Nordquist voted to remove Holbrook as chairman and to replace her in office with Nordquist (Ex. 21; T.p. 586; T.(3)pp. 7-8). On April 27, 1982, the committee of the Connecticut Association of Assessing Officers which had been appointed to investigate the charges, issued its findings and a report in which it found that acceptable assessing procedures had been followed by Holbrook and that no wrongdoing existed on her part (Ex. 7; T.p. 585). Casazza and Nordquist received a copy of the report on April 28, 1982 (T.p. 585; A. 66A). On the following day they formally instituted additional charges against Holbrook by a complaint to the Office of Policy and Management, the agency for the State of Connecticut which is charged with the supervision of municipal assessors offices (Ex. 1; A. 34-35A, 68-69A). The complaint was endorsed by Nordquist as chairman and by Casazza as a member of the Board of Assessors. It accused Holbrook of violating *Conn. Gen. Stat.* § 12-62 by making unilateral changes in the assessed values of properties and with violation of *Conn. Gen. Stat.* § 12-60 by substantive changes to the grand list after it had been signed (A. 35-36A). In the course of the investigation by the Office of Policy and Management which followed, Casazza and Nordquist fleshed out their charges to the investigating committee with the following claims of specific misconduct on the part of Holbrook: (1) 17 instances in which Holbrook was alleged to have favored relatives and friends or in which she had increased assessments on the property of those in her disfavor; (2) 445 properties where "illegal" erasures appeared on the field card records of the assessor's office (later reduced to 323 when the Office of Policy and Management investigators discovered that 122 of the erasures had been made by the appraisal firm) (T.pp. 220, 269-274, 598); (3) improper reduction of the appraised value on a garage; (4) improper classification of several properties as landlocked; (5) improper

combination of two beach lots; (6) undervaluation of marinas; and (7) alteration in the value of 27 properties after the signing of the grand list (T.pp. 1151-1155, 1453-1455; A. 77-82A). In summary, Casazza and Nordquist accused Holbrook of 503 (later reduced to 381) separate violations of her duties as an assessor (T.p. 1155).

Neither Casazza nor Nordquist ever attempted to verify their charges by consulting or comparing available records in the assessor's office, by seeking the advice of other assessors, by obtaining legal counsel, by requesting an explanation of the changes from Holbrook (T.p. 64), or in any other manner (T.pp. 566, 1060, 1084, 1086, 1089, 1109, 1112, 1119, 1122, 1126, 1133, 1136, 1137, 1140, 1144, 1148, 1358, 1362; A. 27-29A, 35-37A, 66A, 74A, 78-79A). Surprisingly, Nordquist never even examined the records which she claimed evidenced misconduct in office by Holbrook (A. 27-28A) and never read the statutes which she accused Holbrook of violating (A. 36A). Casazza refused to accept or heed the advice of the state agency that Holbrook's conduct conformed to the requirements of the assessing statutes (A. 5-7A, 84-89A).

The investigation into the charges filed with the Office of Policy and Management was assigned to a committee headed by Donald Zimbowski, chief of the division of Municipal Assessors. On June 22, 1982 he issued his committee's report with the finding that each of the charges brought against the respondent by the petitioners was unfounded (A. 1-17A; T.pp. 269-273). At the suggestion of the First Selectman, he included in the report a caveat that the method of erasing used by Holbrook to correct the field cards, while not in violation of the statutes as charged, did not adhere to the preferred method of lining-out the amended entries (T.p. 250).

Although Nordquist subsided in her accusations following the report by the Office of Policy and Management, Casazza did not. He persisted in his allegations against Holbrook by further complaint to the supervisor of the Office of Policy and Management in which he not only called into

question the reliability of the investigation, the accuracy of the findings, and the integrity of the investigating committee, but repeated each of his previous accusations with two additions: violation of *Conn. Gen. Stat.* § 12-113 and that Holbrook had duped Nordquist into signing the grand list (A. 84-89A). And, for reasons which were never explained, Casazza republished these defamatory statements by providing a copy to the Middletown Press (T.(3)p. 61). The Office of Policy and Management rejected the renewed complaint as being without justification. Following the conclusion of the administrative investigations, on September 22, 1982 Holbrook served Casazza and Nordquist with a demand for retraction of their charges. They refused to do so (T.pp. 88, 594, 595; T.(3)p. 64). At the trial, Nordquist unaccountably testified that indeed she would bring the charges again (T.p. 600).

Holbrook had been active in civic and community affairs (T.pp. 94, 543) and was a well-regarded person in the community. All of the witnesses from the community (among them, the petitioners) testified that she had an established reputation for honesty, integrity, truthfulness, and for competence as an assessor (T.pp. 472, 518, 519, 615, 616, 1249, 1250, 1330, 1355; T.(2)p. 64; T.(3)pp. 55, 56). As a result of the petitioners' charges, her reputation was ruined (T.pp. 518-519, 541, 599, 1250; T.(2)p. 64); she moved to an adjoining community and her career as an assessor was sullied and destroyed (T.pp. 94-97, 474, 599, 1250, 1254). Holbrook had applied and was a strong candidate for the position of single assessor for the Town of Westbrook (T.pp. 94, 616-619) (a position created as of July 1, 1982); however she was dropped from consideration because of the controversy generated by the petitioners (T.pp. 619, 620, 667, 800; T.(2)p. 24; T.(3)p. 55). Despite 52 applications for an assessor's position, Holbrook was accorded only one interview and received no job offers (T.pp. 95-96). The Town of Westbrook hired an appraisal firm as its assessor for one year, followed by a single assessor at a salary of $7,500 (T.pp. 643, 644). On the basis of a $7,000 annual salary and the value of medical benefits furnished by the Town, Dr. Gary Crakes, an economist, projected a net economic loss to

Holbrook, over her anticipated work life as an assessor, of $181,571 (T.pp. 752-756).

Exemplary damages were limited to attorney's fees and costs (based on a one-third contingency fee agreement between the respondent and her attorney) (T.p. 100; T.(2)p. 34).

The jury affirmatively answered special interrogatories that defamatory statements had been made and published by the petitioners, that, by clear and convincing evidence, the defamatory statements found were false, and that by clear and convincing evidence, the petitioner had acted with actual malice in uttering and publishing the defamatory statements (Casazza R. 17, Nordquist R. 8-9). Verdicts, in these cases which had been consolidated for trial, were returned against each defendant which, in combination, totaled $28,000 in general damages, $181,000 in special damages, $69,667 in exemplary damages, and $7,810 in further exemplary damages (of which $3,819 was subject to remittitur) (Casazza R. 18, 24; Nordquist R. 9, 15). In the separate verdicts rendered against each petitioner, 75 percent of this combined total was awarded against Casazza and 25 percent against Nordquist. From the judgment entered on the verdicts, the defendants took a combined appeal to the Supreme Court of the State of Connecticut.

In that appeal, of the several defamatory statements which had been at issue, the petitioners challenged the finding of falsity only as to the two statements which charged the respondent with violating the state assessing statutes. All of the other statements which equally supported the verdict went unappealed. The verdict was a general one, no request having been made for interrogatories which might delineate each statement found to be false and it is presumed, therefore, that all of the defamatory statements were determined by the jury to have been falsely made. Such was the evidence. On their petition for certiorari the petitioners now readdress and request reexamination on the issue of falsity of the same two statements reviewed by the Connecticut Supreme Court on the issue of malice.

REASONS WHY PETITION SHOULD BE DENIED

The petitioners contend that *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949 (1984) leaves the standard of review unsettled in defamation cases and that on the facts of this case an opportunity is provided to reexamine *Bose* and to extend its standard of review to issues of falsity as well as those of malice. Under *Bose,* the scope of appellate review in a defamation case is an independent examination of the entire record to determine whether it supports a finding of malice by clear and convincing evidence, with due regard to the jury's assessment of the credibility and demeanor of witnesses and a litigant's constitutional right to have all questions of fact decided by a jury.

The scope of review on appeal includes an independent examination of the entire record to determine whether the findings on the issue of malice are clearly erroneous. The term "clearly erroneous" in this context means that when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 104 S.C. 1949, 1959 (1984).

Significantly *Bose* notes "that only those portions of the record which relate to the actual malice determination must be independently assessed. The independent review function is not equivalent to a "de novo" review of the ultimate judgment itself. . . . If the reviewing court determines that actual malice has been established with convincing clarity, the judgment of the trial court may only be reversed on the ground of some other error of law or clearly erroneous finding of fact." *Bose Corp. v. Consumers Union of U.S., Inc., supra,* at 1967 fn. 31.

The purpose of the independent review is to provide assurance that the judgment does not constitute a forbidden intrusion on the field of free expression. *Bose v. Consumers Union of U.S., Inc., supra,* at 104 S.Ct. 1964. Libelous speech is not

protected by the First Amendment, and the independent review to determine whether the judgment is clearly erroneous is limited in function to the safeguard intended and not for the purpose of inserting the reviewing court as a seventh juror or as a substitute fact-finder in the case. This scope of review does not alter the general rule that evidence offered at trial should be regarded in the light most favorable to sustaining the verdict. *See, e.g., Wochek v. Foley,* 193 Conn. 582, 587 (1984); *Goodrich v. Waterbury Republican-American, Inc.,* 188 Conn. 107, 108-09 (1982).

The standards of review under *Bose* are not unsettled, and no conflict exists between this case and the applicable decisions of this court. Review of the opinion below discloses a proper regard and adherence to the constitutionally compelled standards of review introduced by *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710 (1964) and subsequently elaborated in *Bose, supra.* The petitioners failed to assert below any claim that the *Bose* scope of independent review should be extended to issues of falsity as well as those of malice; rather they argued that on intermingled issues of fact and malice, such issues all fall within the *Bose* ambit of independent appellate review. This court does not ordinarily decide questions which have not been raised or involved in the lower court. *United States v. Mendenhall,* 446 U.S. 544, 551-52 n.5 (1980).

The petitioners' argument that the court below inadequately examined intermingled issues of fact and malice finds no support in the record. On the contrary, the opinion of the Connecticut Supreme Court demonstrates "independent review" of the entire record to determine whether sufficient evidence supported the jury's finding of malice by a clear and convincing standard and review of the other facts to determine whether, on the issue of falsity, the evidence furnished a reasonable basis for the jury's conclusions. *Holbrook v. Casazza,* 204 Conn. 336, 343-47 (1987). The court below plainly states that it has made an independent review of the record to determine whether the statements appealed (violation of

Conn. Gen. Stat. §§ 12-60, 12-62) were made with actual malice, that is with knowledge of the falsity or with reckless disregard of whether they were false. *Holbrook v. Casazza, supra,* at 345-46. After reviewing the evidence on these statutory violation claims which, *inter alia,* had been made by the petitioners, the court reasoned that the jury could properly have concluded that the petitioners, after learning of the respondent's initial exoneration, would avoid reckless disregard for the truth in their publications by seeking evidence corroborative of the accusations. Their failure to do so, although records were readily available, the presence of animus, the failure to investigate the facts or to seek advice from knowledgeable persons or to retract the defamatory statements after the respondent's exoneration by Office of Policy and Management evidenced the high degree of awareness of probable falsity demanded by *New York Times Co.* Nordquist made no effort to investigate and did not even read the statutes which she accused Holbrook of violating (A. 35-36A). Casazza not only refused retraction, but, after Holbrook's second exoneration, he republished the defamatory statements to the supervisor of the Office of Policy and Management investigators and to the press. This review of petitioners' conduct with respect to their accusations of statutory violation cannot under any circumstance be characterized, as petitioners have done, as a failure to independently review the evidence in order to determine whether the finding of malice was supported in the record.

The "serious doubt" standard which will support a finding of malice, as reviewed in *St. Amant v. Thompson,* 390 U.S. 727, 88 S.Ct. 1323 (1968) does not mean that libel defendants can defame with impunity merely by claiming, as petitioners do here, that they published the statements with a belief that they were true. To the contrary, a libel plaintiff may prove the defendant's subjective state of mind through the cumulation of circumstantial evidence, as well as through direct evidence. *Tavoulareas v. Piro,* 817 F.2d 762 C.D.C. Cir. (1987) citing *Herbert v. Lando,* 441 U.S. 153, 160, 99 S.Ct. 1635, 1640-41 (1979).

On the issues of falsity, the petitioners make a diffuse argument that the court below ignored, in its review, "undisputed" or "unrefuted facts." It is self-evident by the "statement of facts" and "counterstatement of facts" contained in the briefs and by those facts which are detailed and discussed in the opinion below, that there were no overlooked or undisputed facts and certainly none which might compel that the verdicts be set aside. This case turns upon its own facts and will affect no one other than the litigants. In the ordinary course of events this court does not undertake review to determine whether contested findings of fact, upheld by two courts below (the trial court and the Connecticut Supreme Court), should be set aside in the absence of obvious or exceptional error. *Graver Manufacturing Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). Matters of interpretation of local statutes where federal questions are not involved are appropriately left to state agencies or state courts, and this court should intervene only in the rare instance where the standard appears to have been misapprehended or grossly misapplied. *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 310 (1974). The investigation of the state agency below and its conclusion that the respondent's conduct did not violate the local assessing statutes with which she had been charged by the petitioners, and the Connecticut Supreme Court's examination and deference to that factual finding on falsity created no error in the standard of review. Nor, if error had been made in this regard, would it have affected the outcome, since, of the petitioners' multiple allegations of misconduct on the part of the respondent in her role as an assessor, the statutory violation claims represented only a small fraction of the defamatory statements published by the petitioners. Their remaining accusations of (1) favoring friends and relatives (in seventeen instances); (2) improper reduction of the value of a garage; (3) improper classification of properties as landlocked; (4) improper combination of two beach lots; (5) improper reductions for wetland impact on properties; (6) undervaluations of marinas; (7) undervaluation of farms; (8) violation of wetland statutes; and (9) duping the fellow assessor into signing the grand list, all were well established as false by the evidence and none were made the subject of appeal below or in the petition for certiorari.

CONCLUSION

For these reasons, the decision of the court below was a correct one and the petition for certiorari should be denied. The petitioners' contention that "undisputed" or "unrefuted" facts exist or were disregarded by the court below is neither true nor discernible in the record, and this case, on its own facts, is inappropriate for use as a vehicle to reexamine the constitutional review standards of *New York Times Co.* or *Bose.*

Respectfully submitted.

JOHN E. DONEGAN, ESQUIRE
7 South Main Street
P.O. Box 811
Branford, Connecticut 06405
(203) 481-6261
Counsel of Record